Service of the within and receipt of a copy thereof is hereby admitted this ..... day of March, A.D. 1977.

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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1065

FREDERICK JUDE MCINTOSH,
Petitioner,

vs.

ANAHEIM UNION HIGH SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal, Fourth Appellate District, Second Division, of the State of California.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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I.
Opinions Below.

The opinions below are adequately set forth in the Petition, under the erroneous title, "Jurisdictional Statement."

II.
Jurisdiction.

The petition fails to set forth "a concise statement of the grounds on which the jurisdiction of the court is invoked," in violation of United States Supreme Court Rule 23(1)(b), 28 U.S.C.A.

III.
Questions Presented.

The petition purports to state three questions worthy of this Court's review: Whether the unpublished decision of the Fourth District Court of Appeal, State of California, denied Petitioner's guarantees to due process and equal protection of the law, and whether the California Supreme Court denied Petitioner "due process of law when they (*sic*) denied a hearing."

IV.
Statement of Facts.

The factual summary offered in the petition at pages 6 and 7, unsupported by any citation to the record, is replete with glaring inaccuracies and inconsistencies with those facts found in the unpublished appellate decision at issue. In the interest of brevity, the Respondents herein concur with the facts stated by the Fourth Appellate District Court of Appeal, State of California, attach a copy of said decision hereto as Appendix 1, and incorporate it by reference as if set forth in full.

In simple terms, the facts of this case concern nothing more than the propriety of granting Respondents' motion for summary judgment in a personal injury action, arising from a vehicular collision, upon the trial court's finding, in the absence of triable issue of fact, of an absence of proximate causation as a matter of law.

V.
Argument.

The petition for certiorari should be denied for the following reasons:

First, the Petitioner has wholly failed to meet the responsibilities set forth at United States Supreme Court Rule 23(4), 28 U.S.C.A., in that he has failed to present "with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration." The petition entirely fails to state a single fact or cite a single authority to substantiate the conclusion that entry of summary judgment in this action constituted a violation of the Petitioner's due process and/or equal protection rights.

Second, the instant petition offends each and every sound consideration spelled out at United States Supreme Court Rule 19, 28 U.S.C.A., to justify the review on writ of certiorari of this matter. The petition sets forth no "special and important" reason for granting the petition, but for the unique interest of the Petitioner herein. Moreover, as this appeal stems from a state court opinion, Petitioner has failed to allege or demonstrate how this case involves a "federal question of substance not (h)eretofore determined by this court," in conformity with United States Supreme Court Rule 19(1)(a), 28 U.S.C.A. Nor does the petition allege nor demonstrate how this case was "decided in a way

probably not in accordance with applicable decisions of this court . . ." (*Id.*) In short, the petition presents not a scintilla of substance worthy of review under Rule 19.

Finally, Petitioner's misstatement of the facts of the case, as contrasted with those found by the Fourth District Court of Appeal at Appendix 1, attached, and those apparent within the transcripts lodged before that honorable court, renders null and void the purported issues raised in the petition. Manifestly, there is not simply an absence of an important question of constitutional law requiring review by this Court, but an absence of a viable issue, supported by the record, whatsoever.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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of MCKAY AND BYRNE,

Attorneys for Respondents Anaheim Union High School District, Armida C. Martin, Anthony Ortega and Clifford Wright.

APPENDIX 1

Opinion of the Court of Appeal.

Court of Appeal, Fourth District, Second Division, State of California.

Frederick Jude McIntosh, Plaintiff and Appellant, v. Kathleen Garnet Teske; Anaheim Union High School District, et al., Defendants and Respondents. 4 Civil 15752, (Sup. Ct. 222749).

Filed: Sept. 8, 1976.

APPEAL from a judgment of the Superior Court of Orange County. H. Walter Steiner, Judge. Affirmed.

Robert W. Hardin for Plaintiff and Appellant.

McKay and Byrne, by Benjamin George Williams, for Defendants and Respondents.

BY THE COURT

The instant case involves the propriety of granting a summary judgment in behalf of certain defendants in this personal injury suit by plaintiff.

The facts, for the purpose of the summary judgment issue only, are that on April 15, 1974, at approximately 2:10 p.m. near the intersection of Western Avenue and Bridgeport Street in Anaheim, plaintiff's vehicle was struck by a car driven by Kathleen Teske. Plaintiff was riding his motorcycle in a lawful manner on Western Avenue when Kathleen Teske turned in front of plaintiff and struck him. The collision caused loss of control of the motorcycle which then veered off across the street to collide with a parked school bus waiting to load school children at Western High School. Plaintiff's head struck the bus.

Plaintiff brought suit against Kathleen Teske, Kenneth Teske and Lois Teske. The Teskes were not parties to the motion below and are not involved in this appeal. The defendants which are parties to this appeal are the Anaheim Union High School District, Armida C. Martin (bus driver), Clifford Wright (Anaheim Union High School District Director of Transportation), and Anthony Ortega (Vice Principal of Western High School)—these defendants will hereafter be referred to collectively as the bus defendants.

The declarations on both sides in the summary judgment proceeding were poorly done. However, it is sufficiently clear that plaintiff's case against the bus defendants rests solely upon a claim that the bus was parked in a no parking zone thereby imposing liability upon the bus defendants for negligence.

The declarations were inadequate to resolve the question of whether the bus was legally or illegally parked. The inadequacy of the declarations left this as a question of fact. However, it is not a triable issue of fact.

The court below handled this case in a common sense manner. It was clear to the court under the instant facts that even if the bus was illegally parked, no liability attached to the bus defendants. The court opined that whatever parking statute was involved, its scope of intended protection could not conceivably include a motorcyclist across the street and down the block struck by another's negligence. In other words, the court believed that whatever duty arose by parking the bus in a no parking zone, it did not extend to plaintiff as a matter of law. In addition, the act of parking in the no parking zone was not a proximate cause of plaintiff's injuries.

The triable issue claimed below and on appeal is the question of whether the bus was legally or illegally parked. Plaintiff contends the court erred in going beyond that question and addressing proximate cause on its own motion. This was not error. A motion for summary judgment tests the existence of a triable issue of *material fact*. Plaintiff would have the court's inquiry restricted to the existence of a triable factual issue without regard to its materiality. Although a triable issue appears as to whether the bus was legally parked, even if it is assumed that plaintiff would prevail at trial on the question, it is readily obvious that he would not prevail in the action against the bus defendants. This is because the bus, even if illegally parked, was not a proximate cause of plaintiff's injuries. Thus, the triable issue of the legality of the bus parking does not go to a material fact.

Plaintiff, out of control, would have obviously struck something or fallen in any event. The bus was there. If the bus had not been there it would merely have been something else that added to plaintiff's injuries. The parking of the bus had nothing to do with plaintiff's accident any more than a curb would have had if plaintiff had struck it instead.

Plaintiff challenges the concept that if the bus had not been there it would merely have been something else with which he would have collided. He sees this as impermissible speculation not supported by any facts in the case. Despite this challenge, we think it but a matter of common sense that considering the out of control course of the motorcycle it was but a matter of fortuities as to what would abruptly end the helpless journey of plaintiff. It was but a stroke of legal luck

that the obstruction encountered may have been illegally parked. If the bus had been legally parked there could be no issue in this case. It is not the fact of illegal parking that caused plaintiff's injuries, it is the fact that he had been sent on a careening journey which could only be ended by impact with the ground or collision with an object.

The parked bus is no different than if plaintiff had careened into a nonconforming wall, a truant child, an anxious jaywalker, an overweight streetwalker, or an illegally grazing elephant. Whatever was in his path was to be struck. The distinction between the legality and illegality would seem to be of no moment.

If we do as the trial court did and assume the bus was illegally parked, no triable issue of fact remains. The facts thereby become undisputed and the existence of proximate cause a question of law. (*Arthur v. Santa Monica Dairy Co.*, 183 Cal.App.2d 483, 486.)

In *Arthur* a milk truck was illegally double parked in the slow lane and the driver away from the vehicle. The car in which Arthur was a passenger collided with the rear of the truck. The auto driver (John) did not see the illegally parked truck ahead of him as at the time he was searching for a lighted cigarette which had been dropped on the floor.

The *Arthur* court found that the negligent conduct of the auto driver constituted an intervening act which broke the chain of causation and constituted the proximate cause of the accident. "We do not here have the simple case of direct causation, but one in which an independent force, consisting of the negligent conduct of the driver of the Chevrolet, intervened. Appellant contends, however, that had defendants' truck not

been illegally parked the collision would not have occurred, thus the double parked milk truck was the proximate cause of the accident. It would indeed be nonsense to say that had the truck not been there the Chevrolet would still have run into its rear; but it is not nonsense to suggest that had defendants' parking not been in violation of the law the Chevrolet would still have collided with it. The evidence clearly shows that John would have run into anything at that location, legally or illegally parked. '[I]f the accident would have happened anyway, whether defendant was negligent or not, then his negligence was not a cause in fact and, of course, cannot be the legal or responsible cause.' " (At p. 487.) "Appellant's position that defendants' original negligence was continuing negligence right up to the time of the collision, thus constituting proximate cause, is not well taken. Cases too numerous to mention have well established that an original act of negligence is not a proximate cause of injury when the injury directly results from the intervening act of another, which is an act not to be reasonably anticipated by the first party as reasonably likely to occur and follow through from his own act." (At p. 488.)

The *Arthur* court discussed *McMillan v. Thompson*, 140 Cal.App. 437, in which a truck driver (Zimmer) had mechanical problems with his truck while driving on a two lane road. Instead of moving off onto the dirt shoulder, Zimmer left his truck on the roadway and commenced repairs. McMillan's vehicle approached the truck from the rear and seeing it, commenced to pass. As McMillan pulled out to pass he was struck in the rear by another car driven by Deaver. Deaver's car caused McMillan to strike Zimmer's truck. McMil-

lan's passenger died and in a wrongful death action both Zimmer and Deaver were sued.

After earlier observing that Zimmer's negligence in stopping the truck, if any, was not the proximate cause of the death of McMillan's passenger, the court said: "If it be assumed that the driver of the truck and trailer was negligent in stopping where he did, we think it must be held, under the established rules, that this act upon his part was not a proximate cause of the accident here in question. Had the truck and trailer been moving at the time, the appellants would not have been negligent, but the general situation, so far as the negligence of Deaver is concerned, would have been the same. The stalled truck was plainly visible, with its lights burning, and the left half of the highway was entirely clear, as testified to by the driver of the light truck which was about to pass. Under such conditions, while the driver of the stalled truck must have known that other vehicles would be apt to pass, it would be unreasonable to expect him to also anticipate that, while another car was passing, a third car would come up from behind and crash into the passing car. While a sudden stop frequently causes a collision with a car approaching from the rear, it is not ordinarily to be expected that drivers of automobiles will run head-on into cars ahead of them which are in plain sight and have been long stopped. Much less is it to be expected that a driver will cross to the left half of a highway when the way is not clear, and then crash into a car ahead which is not stopped, but is moving in the same direction as himself. That the defendant Deaver should cross over to the left side of the road and then crash into a car directly in front of him is a circumstance

hardly to have been expected whether the truck and trailer were stopped or moving. In our opinion, the injury here resulted not only from the intervening act of a third party, but from one which was not reasonably to have been anticipated by the driver of the stalled truck as likely to occur and follow through and as the result of his own act." (At pp. 441-442.)

Plaintiff's position is that if the bus had not been illegally parked it would not have been in his path and he therefore would not have been injured by colliding with it. As in *Arthur* and *McMillan,* here the manner of the injury was not reasonably foreseeable to the bus defendants and the location of the bus not an act of negligence proximately causing the injury. The trial court judgment must be upheld.

Judgment affirmed.

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